UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UNITED STATES POSTAL SERVICE

and Case 10-CA-223776

CONNIE RENEE SANCHEZ, an Individual

Kurt Brandner and Laura Evins, Esqs.,
for the General Counsel
Mark F. Wilson, Esq., USPS, San Francisco, CA,
for the Respondent

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Hinesville, Georgia on February 10 and 11, 2020, and by virtual Zoom technology on July 14, 2020. The complaint alleges that the United States Postal Service (the Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act)[1] by unlawfully removing the Charging Party, Connie Sanchez, from the schedule in retaliation for her union activities. Additionally, the complaint alleges that the Respondent violated Section 8(a)(1) of the Act by making statements of futility regarding the grievance filing process to employees at various times in 2018.[2] The Respondent filed a timely answer denying all material allegations in the complaint.

On the entire record, including my observation of the demeanor of the witnesses[3] and considering the briefs filed by the General Counsel and the Respondent, I make the following

[1] 29 U.S.C. §§ 151-169.

[2] All dates refer to 2018 unless otherwise stated.

[3] Certain testimony and exhibits have been highlighted with citations to the record. It is noted, however, that my findings and conclusions are not based solely on those specific citations, but rather a review and consideration of the entire record. In assessing credibility, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated by or consistent with documentary evidence and/or established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Corp*., 335 NLRB 622, 623 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB,* 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997).

FINDINGS OF FACT

I. JURISDICTION

The Respondent provides postal services for the United States and operates facilities nationwide, including in the State of Georgia and its facility located at 40 E. Academy Street, Ludowici, Georgia (the Ludowici Post Office or Ludowici facility). The Respondent admits and I find the Board has jurisdiction over the Respondent and this case by virtue of Section 1209 of the Postal Reorganization Act.

At all material times, the National Association of Letter Carriers (the Union) has been a labor organization within the meaning of Section 2(5) of the Act and the exclusive collective-bargaining representative based on Section 9(a) of the Act. The Employer's recognition of the National Union's representational role has been represented in successive collective-bargaining agreements (CBA), and I find that it has been an agent of the Union for purposes of representation of unit employees at the Ludowici Post Office.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Respondent's Operations*

The Ludowici Post Office is a relatively small facility – the size of a trailer. It houses three desks – one in the front for customers, a desk for the clerk, and one for the postmaster – and six or seven cases where carriers sort mail. Its carriers deliver and collect mail within ZIP Code 31316.

Mail collected by the facility's carriers each day is picked up and delivered to the nearby Hinesville Post Office by 5:30 p.m. That and other mail collected and delivered to the Hinesville facility is transported to a distribution facility in Jacksonville, Florida. That facility is approximately 111 miles from Ludowici, and the driving time is up to two hours each way. That truck usually leaves around 7:00 p.m. If any mail collected by the Ludowici facility misses the truck delivery to Hinesville, then someone must deliver that mail to Hinesville before 7:00 p.m. If such mail is not delivered to Hinesville before the truck leaves at 7:00 p.m., someone must transport that mail to the Jacksonville facility.

The Ludowici Post Office employs approximately ten employees at this facility. Ernest Warden served as the facility's postmaster from 2017 and until May 2018.[4] Veronica White replaced him in May and served as postmaster through July. Management of the facility then rotated among a dozen or more officials until Shaun Smith was appointed postmaster in October 2019. They supervised the facility's clerks, rural carriers and rural carrier associates. At certain times, they consulted with Lasandra Crawford, a labor relations specialist, and Claudette Ballard,

[4] The General Counsel's request for an adverse inference based on the failure to call Warden as a witness is denied. There is no proof that he is still employed and/or under the control of the Respondent. The only reference in the record indicates that he was unavailable to White after May 1. (Tr. 317.) See *Denny's Transmission Service*, 363 NLRB No. 190 (2016) (request for adverse inference denied where employer failed to call a witness no longer in its employ).

a health and resource manager.[5] The facility's regular rural carriers include Luz Steiner[6] and Tina Peacock. Sanchez, the charging party, is a rural carrier associate.

Michael Chestnut, a rural delivery specialist, created the Ludowici Post Office mail routes in 2018. In determining the shift time necessary for carriers to deliver the mail, Chestnut drove each route with a carrier or union representative. Adjustments were made as appropriate considering factors such as driving and walking times, the number of mailboxes and volume.[7] The facility's carriers typically completed their routes within the times calculated by Chestnut.[8]

B. Connie Sanchez[9]

Sanchez has been a rural carrier associate since 2017. She works between 10 to 50 hours per week. Prior to working at the Ludowici facility, Sanchez worked for Respondent in North Augusta, South Carolina. On April 29, 2017, while working in North Augusta, Sanchez suffered a chemical burn to her respiratory tract that resulted in a form of asthma. That respiratory illness, reactive airway dysfunction syndrome, caused her to be hypersensitive to heat, cold, humidity, chemicals, changes in weather and dust.[10] Sanchez was out of work from May 29, 2017 until October 17, 2017 and filed a claim for workers' compensation with the Department of Labor (DOL). DOL accepted Sanchez's claim as compensable but denied her request for continuing benefits for loss of pay in the future. Sanchez appealed that determination.[11]

Sanchez transferred to the Ludowici Post Office after returning to work in October 2017. Her regular schedule assigned her to work 8.8 hours each day, starting at 8:00 a.m., with an

[5] The Respondent admits that these individuals were supervisors and/or agents at all relevant times pursuant to Sections 2(11) and (13) of the Act.

[6] The transcript incorrectly listed Steiner's first name as Luza. The documentary evidence lists her correct full name as Luz Aida Steiner.

[7] Chestnut credibly explained the process by which he calculated the routes and times necessary to complete them. (Tr. 543-87; R. Exh. 33.) Turner, a rural carrier with a pending workers' compensation claim, refused to sign the evaluation details and data collection form. (R. Exh. 34.)

[8] Most of the facility's carriers, except for Sanchez and Turner, completed their routes within the designated times. (GC Exh. 32 at 22; R. Exh. 22.) I do not credit Sanchez's assertion that her route was improperly and discriminatorily created with the intent to force carriers to resign. (R. Exh. 8.) In fact, Sanchez completed her route on time on April 12 and 13. (R. Exh. 22 at 2.)

[9] Sanchez was an extremely loquacious witness. On several occasions, she was instructed to refrain from interrupting me and counsel, speaking out of turn, and to restrict her answers to the questions asked. Nevertheless, I credited her testimony to the extent that it conflicted with White regarding the latter's coercive statements. White was present throughout the testimony of all the General Counsel's witnesses and provided only terse denials in response to leading questions. See *Aqua-Aston Hospitality, LLC*, 365 NLRB No. 53, slip op. at 8 (2017) (witness' presence during entire hearing, which enabled her to listen to disputed testimony by opposing witnesses, detracted from the reliability of her own testimony).

[10] GC Exh. 5; R. Exh. 25.

[11] Crawford testified that Sanchez did not have ongoing workers' compensation rights and benefits, although her appeal was pending when she transferred to the Ludowici facility. (R. Exh. 26 at 6.) Accordingly, she asserted that light or limited duty was not available to Sanchez because the CBA does not offer such an accommodation for rural carriers. (Tr. 357-59; R. Exh. 24 at 74.) Reliance on that line of defense collapsed when Sanchez prevailed in her workers' compensation claim in 2019.

expected departure to cover her assigned route at 10:45 a.m. The job description includes the following duties and responsibilities:

(1) Sorts mail in delivery sequence for the assigned route.

(2) Receives and signs for accountable mail.

(3) Loads mail in vehicle.

(4) Delivers mail to customers along a prescribed route and on a regular schedule by a vehicle; collects monies and receipts for accountable mail; picks up mail from customers' roadside boxes.

(5) Sells stamps, stamped paper and money orders; accepts C.O.D., registered, certified, and insured mail and parcel post; furnishes routine information concerning postal matters and provides requested forms to customer.

(6) Returns mail collected, undeliverable mail, and submits monies and receipts to post office.

(7) Prepares mail for forwarding and maintains records of change of address information.

(8) Prepares a daily trip report and maintains a list of the customers on the route.

(9) Conducts special surveys when required.

(10) Maintains an inventory of stamps and stamped paper as needed to provide service to customers on the route.

(11) Provides for mail security at all times.[12]

In addition, her work was "subject to outside exposures" for extreme temperatures, high humidity, fumes, dust and noise.[13]

C. The Collective-Bargaining Agreement[14]

The 2015-2018 collective-bargaining agreement (CBA) between the Respondent and the Union recognizes the Union as the exclusive bargaining representative of all employees in the following unit for which the Union has been recognized and certified at the national level:

> All city letter carriers, excluding all managerial and supervisory personnel; professional employees; employees engaged in personnel work in other than a purely non-confidential clerical capacity; security guards as defined in Public Law 40 91-375, 1201(2); all Postal

[12] R. Exh. 29 at 2.
[13] Id. at 42.
[14] R. Exh. 24.

> Inspection Service employees; employees in the supplemental work force as defined in Article 7 of the parties' collective bargaining agreement; rural letter carriers; mail handlers; maintenance employees; special delivery messengers; motor vehicle employees; and Postal clerks.

Article 3 of the CBA recognizes the following management rights, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

> (a) To direct employees of the Employer in the performance of official duties;
> (b) To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;
> (c) To maintain the efficiency of the operations entrusted to it;
> (d) To determine the methods, means, and personnel by which such operations are to be conducted; . . .

Article 7, Section 2, defines rural carrier associates as noncareer employees who "provide service on established regular and auxiliary rural routes in the absence of regular or auxiliary rural carriers. This service may be as leave replacement and/or covering vacant regular routes pending the selection of regular rural carriers, as an auxiliary assistant, or as an auxiliary route carrier. . . C. Rural Carrier Associates (RCAs) (Designation Code 78) Rural carrier associates are those employees selected from a hiring list or reassigned from rural carrier relief or auxiliary carrier positions, on or after April 11, 1987, without time limitation."

Article 8 defines the work week and the establishment of work schedules for regular rural carriers:

> Section 8.1. Work Week
>
> The basic work week for regular rural carrier employees shall be six (6) days, except as relief days are provided for certain carriers and for carriers serving triweekly routes. Regular rural carriers may not work on Sunday.
>
> Section 2. Work Schedules
>
> Daily schedules shall be established to coincide with the daily evaluation of the route and adjusted periodically as required. The carrier's work day may vary above or below the daily evaluation of the route as mail volume fluctuates and road and weather conditions change.

Article 13.1 obligates the Respondent to "make an effort to assist employees who through occupational injury or occupational illness are unable to perform their regularly assigned duties. This effort will consist of possible assignment to limited duty work if such is available." Article 13.3 states that "[i]n the rural carrier craft, at any local installation, regular rural routes shall not be considered for any light duty assignment."

Article 15 specifies a 4-Step grievance and arbitration procedure. In pertinent part, Step 1 requires "[any] employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union has learned or may reasonably have been expected to have learned of its cause. The employee may be accompanied by the steward or a Union representative, if the employee so desires."

Article 16 describes the disciplinary procedure for all employees. The process emphasizes corrective over punitive action and requires "just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Different levels of discipline include private discussion between management and an employee for minor offenses, a letter of warning, suspension and discharge."

Article 17 explains, in pertinent part, the rights of Union stewards and representatives to request information and investigate grievances on behalf of unit employees:

> Section 3. Rights of Stewards
> When it is necessary for a steward to leave the work area to investigate and adjust grievances or to investigate a specific problem to determine whether to file a grievance, the steward shall request permission from the immediate supervisor, and such request shall not be unreasonably denied. In the event the duties require the steward to leave the work area and enter another area within the post office, the steward must also receive permission from the supervisor from the other area the steward wishes to enter, and such request shall not be unreasonably denied.
>
> The steward or other Union representative . . . may request and shall obtain access through the appropriate supervisor to review the documents, files and other records necessary for processing a grievance or determining if a grievance exists and shall have the right to interview the aggrieved employee(s), supervisors and witnesses during working hours. Such requests shall not be unreasonably denied.

Article 30.1 recites several working rules for rural carriers. They are assigned routes, which may be remeasured at the carrier's request or whenever the Respondent deems it necessary. In the case of rural carrier associates, they may be "utilized on up to three routes." All rural carriers are entitled to one lunch break per shift totaling 30 minutes. "Segments may be taken in the office or on the route, provided the normal schedule is maintained to the extent possible . . . Scheduling is the responsibility of the [Respondent] . . . shall be realistic, based upon the receipt and availability of the mail, the route evaluation, and other related service considerations." While all rural carriers are entitled to "receive reasonable advance notice when the schedule is to be changed," the article permits only regular rural carriers to submit written comment on any proposed adjustments to their routes.

Article 30.2 incorporates the disciplinary process at Article 16 and lists the following actions as just cause for the removal of a rural carrier associate: repeated unavailability for work, failure to maintain the regular schedule within reasonable limits, delay of mail, and failure to perform satisfactorily in the office.

Article 34 addresses work and time standards and espouses the principle "of a fair day's work for a fair day's pay:" The Respondent is required to implement work measurement systems or time or work standards that are "fair, reasonable and equitable." The Union is to be "kept informed during the making of time or work studies which are to be used as a basis for changing current or instituting new work measurement systems or work or time standards."

The CBA does not address the specific situation where a rural carrier associate suffers a job-related illness or injury. It does, however, include a Memorandum of Understanding (6.) establishing a process for regular rural carriers who incur job-related illness or injuries and are unable to perform all the duties of their routes for a period of two years or submit medical certification that they will be unable to perform all their duties for a period of two years:

> In that case, the employee must relinquish his or her route and such route will be posted for bid in accordance with Article 12.3. The Employer may choose not to have the regular carrier relinquish the route, if the Employer determines, after review of the medical documentation, that the carrier is able to case and deliver his or her entire route. If after providing such assistance, the Employer subsequently chooses to no longer provide the assistance to the carrier and the carrier is unable to perform all the duties of his or her assigned rural route, the carrier must relinquish his or her route. The Employer's decision to have the carrier relinquish or not relinquish his/her route is not a grievable matter under the National Agreement.
>
> Prior to posting a route relinquished after the two year period, the Employer will request that the employee provide medical certification indicating whether the employee is, at that time, able to fully perform the duties of the assigned rural route. If the employee fails to provide such certification within 30 days of notification to do so, or if the medical certification reflects that the employee is unable to perform the full duties of the assignment, the route shall be posted, and the employee shall not be permitted to exercise his or her bid rights as to that posting.
>
> The parties agree that the period of two years is considered uninterrupted unless the regular rural carrier is able to perform all the duties of his or her assigned rural route for a period of six or more consecutive months.
>
> When a regular rural carrier relinquishes his or her route as a result of the above circumstances, has not yet been placed in a modified job assignment, and is working a limited duty assignment, the employee will become an unassigned regular rural carrier. Rural routes numbers 960 through 979 may be created as needed, and the carrier will be assigned to one of these routes. The employee will continue to perform the current limited duty assignment until the appropriate action is taken to have the carrier reassigned to a modified job. Management will continue to make every effort to assign this employee to a modified job.

D. Sanchez's March 2018 Injury and April 2018 Reasonable Accommodation

Sanchez transferred to the Ludowici facility in October 2017. On March 17, Sanchez became overheated and went to the emergency room. She was out sick for 10 days. On March 23, Dr. Ryan Moody, a pulmonary specialist, initially gave Sanchez a doctor's note stating that Sanchez was "to refrain from environments with extreme heat, humidity or dusty environments."[15]

Sanchez handed the doctor's note to Warden on March 26. He asked Sanchez to sign a release of information for her medical records to allow the occupational nurse to talk to her doctor about her restrictions.[16] Sanchez refused and said that the HIPAA privacy law prevented him from requiring her to release her medical information.[17] She did say, however, that she was willing to have her doctor explain the restrictions in another note. Warden acquiesced and instructed Sanchez to have the doctor clarify what he meant by "extreme heat." She returned late that day and gave Warden a revised doctor's note:

> Patient is to refrain from exposure to excessive heat or cold as defined by 10 degrees higher or lower then (sic) the average temperatures for that climate. Patient is also to refrain from exposure to excessively dusty environments, chemical exposure and damp or moldy environs. Patient is to wear a mask to avoid exposure to these allergens.[18]

Warden accepted the doctor's note but informed Sanchez that he would need to consult with his supervisor and the occupational health nurse before she could return to work.[19]

On April 6, after not hearing from Warden, Sanchez submitted a written request for reasonable accommodations avoiding extreme heat, humidity and dust due to her asthmatic condition.[20] She also filed a grievance alleging that management violated the CBA by "not returning grievant to duty on March 26."[21]

On April 11, Warden forwarded Sanchez's doctor's note and request for reasonable accommodations to Crawford and Jakob.[22] He also asked whether Sanchez could work as a rural carrier associate with the requested restrictions. After Jakob asked what Sanchez wanted as an accommodation, Warden replied, "[j]ust to have a mask if it get dusty, and to take a cool down brake (sic) if needed. I see not (sic) problems." Jakob replied that he would check with the District Reasonable Accommodation Committee (DRAC) Chairman "to see if you need to do anything else other than say ok." Crawford informed Warden that she "sent it to the OHNA

[15] GC Exh. 2.
[16] R. Exh. 7-8.
[17] 45 CFR Part 160 and Subparts A and E of Part 164.
[18] GC Exh. 3.
[19] Sanchez's testimony on this point was unrefuted. (Tr. 36-40, 198-99; R. Exh. 7-8.)
[20] GC Exh. 5.
[21] GC Exh. 4.
[22] Based on the documentary evidence, Jakob appears to have been covering for Ballard.

[occupational health nurse administrator] for verification."[23] She and Warden subsequently consulted with the "owner" of her district office who is an occupational health nurse.[24]

On April 12, after communicating with Jakob and Crawford, Warden contacted Sanchez and told her to return to work. He also approved Sanchez's "Request for Light Duty" for one year.[25] The form listed the reason for the request, in part, as "Pulmonary/RADS Respiratory Disease Work Related.[26]

Sanchez returned to work on April 12. Her schedule and timecard information for that day and April 13 reflect that she performed her delivery work on Route 5 within the 8.8 hours allotted. She started at 8:00 a.m., returned to the facility at 4:50 p.m. and clocked out at 5:05 p.m. She took 25 minutes for lunch one day and 30 minutes the next.[27]

On April 13, Sanchez requested days off from May 16-19 to attend her daughter's graduation and May 26-30 to attend another family graduation and party out of town. The requests were signed and granted by Warden on the same day. White was aware of both requests upon assuming Warden's position at the Ludowici facility.[28]

Beginning on April 28, Sanchez began taking more time to complete her route. On that day, she worked 9.58 hours to deliver most of her route but was unable to complete it without additional assistance. Between April 28 and May 11, Sanchez needed between 11 – 15 hours to complete her route each of the six days that she worked. Her Rural Carrier Trip Report indicated that she took lunch and rest breaks totaling in excess of 30 minutes each day.

E. White Replaces Warden as Postmaster

Warden was replaced two weeks later by White on April 30. Sanchez first met White on April 27. White came to the Ludowici facility to prepare for the transition and was speaking with Warden at the time. Warden motioned to Sanchez and said that she was the employee with

[23] GC Exh. 30.

[24] Crawford, a labor relations specialist, and Warden consulted with the "owner" of her district office building in Jacksonville and determined that Sanchez's extreme heat restrictions prevented her from working whenever the outside average daily temperature exceeded 85 degrees. She "drew the line" at that temperature based on an average daily temperature of 75 for an unspecified period – no indication if for the month, season or year – and added 10 degrees. However, that posture only surfaced after her client, White, took over as postmaster since she did not disagree with Warden on April 12 when he approved Sanchez's return to work. (Tr. 361-65.)

[25] GC Exh. 6.

[26] In response to leading questions, Crawford testified that Sanchez was "not entitled to any kind of light duty accommodations," even though she approved them at the time, because Sanchez did not have an accepted workers' compensation claim. She also agreed with counsel's assertion that she was not entitled to any kind of light duty accommodations "because she was in the rural craft." (Tr. 356-60.)

[27] At Respondent's request, I administratively notice the maximum temperatures in Ludowici for the following days: March 17 – 78; May 7 – 86; May 10 – 87; May 11 – 93.

[28] I did not find credible White's terse denial that she did not know about the May 16-19 leave request, which was approved on the same day that Warden approved the May 26-30 leave request. (GC Exh. 8; R. Exh. 2; Tr. 326.).

the medical accommodations and who filed a grievance over back pay. He added that the information was on his desk. White replied that she did not have time to hear about that on her first day at the facility.[29]

On May 4, Sanchez attempted to speak with White about a payroll issue. White replied that the disputed pay was during Warden's tenure, not hers, and she did not have time to discuss it. Sanchez called and informed her Union representative, and then attempted to file a grievance with White.[30] White refused to sign the form, simply telling Sanchez to get to work.[31]

Over the next several days, Sanchez returned from her route after 7:00 p.m.: May 4 – 7:10 p.m.; May 5 – 8:00 p.m.; and May 7 – 7:40 p.m. Each time, the Hinesville truck had already left at 7:00 p.m. During this time, Sanchez took breaks in the office before starting her route and incurred stationery time while on the route. White became concerned because she did not authorize the additional breaks and, due to Sanchez's late return to the office, she had to drive the mail approximately two hours each way to the Jacksonville distribution facility.[32]

On May 7, White emailed Ballard and told her that Sanchez "fails to be proficient on any route that she works on, and alleges that she inhaled something when she worked in Augusta that damaged her lungs, which causes her to be slow. When I started on 04/28 she had already submitted a 3971 for a OWCP doctor's appointment in Augusta. So, I put her in for code 049 leave. Please advise me does this employee have limitations or is she on a 2499X. Should she even be working if she claims she has lung issues?" [33]

On May 8, Ballard informed White that Sanchez filed a claim stating that "she inhaled some type of chemical however her claim was denied. Currently this employee has no open OWCP case. You should not be coding her time as "049" (10D/LWOP), if she has a doctor's appointment she must use her own personal leave or LWOP. Currently I am on a detail

[29] I credited the testimony of Sanchez and Steiner that they heard Warden tell White about Sanchez's medical restrictions (Tr. 46-47, 147.) White's denial that she was informed of Sanchez's medical restrictions or accommodations, on the other hand, was not credible. She conceded that she spoke to Warden and vaguely described coming to the facility only to have Warden turn over the funds. Further detracting from the credibility of her testimony is that it was elicited in response to leading questions. (Tr. 308-09, 316-17.)

[30] GC. Exh. 4.

[31] I credit the detailed testimony of Sanchez, Peacock, and Steiner, confirmed by White, that they all attempted to file grievances with White. White, however, consistently refused to accept, telling employees that she did not have time for their grievances. (Tr. 41, 50-51, 107-10, 115, 153, 321.)

[32] White's detailed testimony regarding her obligation to deliver the late-arriving mail to Jacksonville was not disputed. (Tr. 309-12.) Otherwise, there is no evidence of problems in the facility's operations attributable to the less structured work environment that existed when Warden was the postmaster.

[33] White's testimony, in response to leading questioning, that she was concerned about Sanchez's health if she pushed her to complete her route within a certain period, was not credible. (Tr. 316-18.) White never expressed such a concern to Sanchez. She simply started a paper trail calculated to rid herself of Sanchez.

assignment but I have copied the specialist who is taking my place should you have any additional questions."[34]

On May 10, Sanchez was adversely affected by the hot weather and took two breaks during her shift.[35] The maximum temperature in Ludowici that day reached 87 degrees.[36] She needed two and one-half hours of assistance from other carriers and arrived late to the facility at 6:45 p.m. White had already left.

On May 11, Sanchez tried again to hand White her pay-related grievance. However, White told her to "get out of my face. I do not have time for this." White asked Sanchez why she was taking so long to complete her route. Sanchez told White that Warden approved her accommodations to take additional breaks as needed. White told her she was not permitted to take additional or excessive breaks if she could not be back by 6:00 pm. She added that Sanchez was not entitled to excessive or additional breaks because her workers' compensation case had been denied and, as such, she was not entitled to accommodations. White also asked Sanchez for medical documentation substantiating her claim. Sanchez refused and went out to the parking lot to call her union representative. White followed Sanchez outside, while Peacock followed White. White then told Sanchez that she could not contact the Union during work time. Sanchez stayed on the telephone and said she was entitled to a 30-minute lunch break. White reiterated that Sanchez needed to hang up the telephone because the Union was not going to help her in any event. Sanchez hung up the telephone and returned to work.[37]

Sanchez eventually left the facility to begin her route at 12:01 p.m. Although she later took her regular 30-minute break, Sanchez experienced heat exhaustion and took additional breaks of 16, 16 and 11 minutes. Although her schedule required her to return to the facility by 5:30 p.m., Sanchez did not return until 6:45 p.m.[38]

On May 12, Sanchez called out sick due to "[m]igraine chest tightness hard to breath overheated yesterday."[39] She called out again on May 14. On May 15, Sanchez took leave previously approved by Warden on April 13. The leave extended through May 19.

On May 15, White instructed Peacock to deliver a certified letter to Sanchez requiring her presence for an investigatory interview on May 17. Peacock told White that Sanchez was away

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[34] Ballard's statement was not entirely correct since Sanchez's workers' compensation case was appealed. (R. Exh. 26 at 1-2.)

[35] White did not deny that Sanchez left her messages that day. Sanchez testified that she took "a couple of extra breaks that day. I took a 25-minute break total. In her August 30 letter to DOL, however, Sanchez clarified that she attempted to notify White of the breaks after she had already taken them. (Tr. 51-52, 308.)

[36] There is no evidence as to what the average temperature was that day and whether 87 degrees exceeded it by more than 10 degrees.

[37] Peacock corroborated Sanchez's credible and detailed testimony regarding this exchange over White's curt denial. (Tr. 51-54, 116-17, 260, 308, 313-14, 319; GC Exh. 7).

[38] The Respondent concedes that Sanchez suffered from heat exhaustion due to the heat that day, and suffered severe, serious, and prolonged illness as a result of the heat. (Tr. 55-58, 313-21.)

[39] R. Exh. 18.

for a graduation and her leave had been approved by Warden. White disregarded that comment and reiterated that she needed to deliver and sign for receipt of the letter. Peacock complied.[40]

On May 18, White initiated the process to discharge Sanchez. Sanchez was not notified. The disciplinary action request was approved by the regional manager in Jacksonville:

> On May 17, 2018, Ms. Sanchez failed to report for an investigatory interview about her Unsatisfactory Performance. She was notified by regular mail with tracking, and via certified mail. By failing to appear or respond, Ms. Sanchez violated ELM 665.3, and did not cooperate in this investigation.[41]

Sanchez returned home on May 20 and read White's letter requiring her to attend the investigatory interview on May 17.[42] Sanchez's first day back would have been May 21, but White had already taken her off the schedule.

When Sanchez returned to work on May 21, White told her to leave. Sanchez asked for an explanation and when she should return. White simply replied that Sanchez would get something in the mail. Sanchez persisted in seeking an explanation and White threatened to call the police if Sanchez did not leave. Sanchez left but filed a grievance over the action.[43]

F. *The Respondent's Changes Position Regarding Sanchez's Accommodations*

On May 25, Sanchez and Union representative Kathleen Brunson met with White. White stated that she did not know what they were there to discuss. Sanchez and Brunson proceeded to hand her grievances regarding her removal from the schedule, the pay period issue, and denial of reasonable accommodations.[44] That day, Sanchez also provided the Respondent with a medical note, dated May 23:

> With current medication she is better but not at baseline. She does need to follow work restrictions to avoid heat, extremes in temperature and humidity, avoid any triggers – bleach, cleaning chemicals, perfumes, air fresheners. If there are any questions please contact my office.[45]

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[40] White's failed to refute Peacock's credible testimony that White simply ignored her statement that Sanchez was away on leave approved by Warden. As such, White's testimony that she saw a leave slip for May 26-30 but not May 15-19 is not credible. (Tr. 117-19, 326-27; GC Exh. 8-9, 28-29; R. Exh. 2.)

[41] GC Exh. 32.

[42] GC Exh. 9.

[43] Sanchez's description of this encounter was credibly corroborated by Peacock and Steiner. (GC Exh. 13; Tr. 62-63, 80, 120, 150.)

[44] GC Ex. 10-12.

[45] Like the Respondent, Sanchez began to refer to the workers' compensation process in support of her position. She argued that the March 26 note defining extreme heat was improper because her workers' compensation physician disagreed with that definition: "extreme heat doesn't mean anything and it's up to you to know how you feel." (Tr. 191-92, 205; R. Exh. 25 at 1.)

On May 30, White prepared a summary of delivery time used by Sanchez, plus the assistance from others, in delivering her route on the following dates: May 4 (12.35 hours), May 5 (11.67 hours), May 7 (15.45 hours), May 10 (13.24 hours) and May 11 (14.08 hours).[46] In an email to a labor relations specialist, White laid out the reasons for discharging Sanchez: (1) she took too long on her route on several dates; (2) it was "grossly unfair" that other carriers had to assist her; and (3) her attendance was "atrocious."[47]

On June 1, White denied Sanchez's grievances on the grounds that she did not work on May 15, was unable to work due to medical restrictions imposed by her physician relating to temperature references, refused to provide requested copies of her accommodations, was unable to perform the requirements of a rural carrier associate, and her payroll grievance was untimely.

On June 6, Peacock and Steiner attempted to file grievances with White regarding their route measurements. However, White refused to sign them and added that they were wasting their time and the Respondent would believe her over them.[48]

On June 12, Sanchez and Robin Moody, a Union representative, met with Crawford and Anne Kachowsky, an occupational health nurse. Crawford explained to Sanchez that she needed to provide the documents to enable the Respondent to "have a clear understanding of how many breaks she needed." According to Crawford: "It needed to be quantified. It needed to have some medical rationale. We had to be able to assess it, but it had to come from her medical provider." Sanchez insisted, however, that the March 23 doctor's note defining extreme heat was incorrect because her workers' compensation physician, Dr. Hosein, did not provide a specific temperature limitation. The necessary implication of Dr. Hosein's generalized restrictions, according to Sanchez, was that she be permitted to take unrestricted breaks depending on how she felt. Nevertheless, Sanchez agreed to obtain and provide the Respondent with additional medical documentation supporting her position.[49]

Sanchez filed additional grievances after the June 12 meeting. White denied those grievances on July 3 as untimely and on the grounds that Sanchez was unable to work based on

[46] Chestnut, who managed the work standards data (evaluated time analysis), testified that it was extreme to need 11-13 hours to complete an 8.8-hour route and that it is grounds for termination. (Tr. 593-96.) However, he did not say that termination would necessarily be applied.

[47] The Respondent assails Sanchez as a malingerer and motivated by ideology and money. The record reveals that after she was removed from the schedule on May 21, her interaction with human resource, medical and labor relations staff was plagued by inconsistencies – at certain points she refused to provide further medical information and at other times delayed in providing agreed-upon information. However, the Respondent never demonstrated that Sanchez's delays in completing her route prior to May was due to malingering as opposed to her asthmatic condition. (GC Exh. 32 at 12.)

[48] Neither Peacock nor Steiner mentioned White's statement about the futility of the grievance process in their affidavits. Nevertheless, I find that to be a minor omission at the time since they did mention that White made rude comments. Accordingly, I credit the consistent and detailed testimony of Peacock and Steiner over White's flat denial in response to leading questioning that she ever made such statements. (Tr. 124-25, 155, 322.)

[49] The testimony of Sanchez and Crawford regarding this meeting is generally consistent, although Crawford mistakenly referred to the date as June 7. (Tr. 75, 80-81, 191-92, 204-05, 376-77, 387-88; R. Exh. 26 at 14.)

the medical statement of her physician and refused to provide updated medical documentation.[50] On June 26, 2018, Sanchez filed another grievance requesting assignment to a clerk position at the Ludowici facility. White refused to sign that one as well.[51]

There was no further discussion of her medical documentation until July 3, when Kucharsky informed Sanchez that she did not "need anything more right now from you at this time." Sanchez replied: "[t]he doctor said that was all he could put legally. Let us know if we can get that other form filled out again[.] If so, email it[.] They ask for two days. Thank you." Kucharsky replied on July 5:

> We don't understand what you are trying to communicate. We have a current medical doctor's note on you. The day we spoke with your labor representative, you, Ms. Debrow (safety manager . . .), Lasandra Crawford (labor representative), and myself that day, you seemed to believe that the May 23rd note referencing temperature was possibly different than what was identified by the doctor. I believe you were going to discuss that with him further regarding the specific temperatures and if he felt the note should be changed you were going to provide us with new medical documentation. We are abiding those terms of that latest medical note and satisfies your restrictions and you are not working on those hotter days.[52]

That same day, Sanchez text messaged Michael Nathan, a Union official, regarding the status of her grievances and her intention to attend a meeting on July 10 between Brunson, Moody and the Respondent's representatives. Nathan referred Sanchez to her union representatives and informed Sanchez that the meeting was only for "employees who are currently in a [working] status." Sanchez replied that she had "given everyone enough proof to prove [White] did not know what my restrictions or accommodations I had on the day she sent me home and took me off the schedule yet she used it as excuse on my grievances so that's her caught in a lie."[53]

On July 25, DOL granted Sanchez's workers' compensation claim based on her workplace injury on April 29, 2017.[54] On August 30, Sanchez explained to DOL that she refused to submit any CA7 forms, other medical information or medical release. She opined that her removal from the schedule was not based on medical considerations and should thus be paid by the Respondent and not through workers' compensation as the Union suggested. Sanchez estimated the amount owed her "at least 9 hours a day for 6-7 days a week" due to White's retaliation by "refusing her breaks in 90 to 100-degree weather." She decreed the conditions under which she would pursue workers' compensation benefits:

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[50] GC. Exh. 15-16.
[51] GC Ex. 19.
[52] R. 26 at 12-14.
[53] R. Exh. 11.
[54] The Respondent contends that although the ruling made it possible for Sanchez to qualify for limited duty, she still needed to provide new medical information with restrictions that the Respondent could accommodate.

> Once I receive a letter stating I can no longer be accommodated then and only then will I file from that day forward on work comp, but as far as the time from May 21, 2018 to now I believe it is not work comp it is retaliation and should be handled as so through the grievance process and EEOC. I deserve to be compensated for this time and will expect or accept nothing less. I have filed my CA7's for the Original DOI through May 20, 2018, but that is it until I receive a letter stating that I will no longer be accommodated then I can go from that day forward and file on work comp. By the USPS and the Union telling me to file this time on work comp I would be falsifying documentation and would have no medical documentation to back it up, also I would be cheated out of money and wages I deserve due to the percentages that work comp pays verses the actual hours and days I was cheated out of by Veronica White allowing other RCAs from other offices and those who come after me on matrix to work and not me. I have me on matrix to work and not me. filed CA7s for the time from my injury date originally April 29, 2017 until May 20, 2018 and no more until I get a letter stating that I cannot be accommodated and that I am out due to my accommodations not being accepted and approved.[55]

On September 20, Sanchez relented and informed Ballard that she "resigned and dated and faxed" a CA7 form. On September 27, Ballard replied that the DOL was unable to process her CA7 form because they needed additional medical information. On October 22, Sanchez inquired as to the status of CA7 forms that she submitted the previous week. On October 23, Ballard asked Sanchez to contact her because she still had not received a CA7 form from her. She told Sanchez by telephone on November 6 that she still had not received any CA7 forms.[56]

On December 3, Sanchez finally responded to Kucharsky's July 5 email requesting additional medical documentation:

> [i]t has not been hot for months and I have not been allowed to return to work why is that also I was never given any documentation as to my accommodations being taken away due to retaliation from [White]. My [doctor] has never said I cannot work. The emergency room follow up pulmonologist said about temperatures then after seeing him I returned to my work comp doctor on May 23 on May 25 I supplied a new updated doctors note which I attached to my email to [Doberow] where no set temperature was mentioned. However had [White] not sent me home as retaliation we would not be having this conversation. I was working with my accommodations since April 12 when my accommodations were approved by Ernest warden lasandra Crawford and Michael Jacobs. However since then it has not been hot the complete opposite so why have I not been allowed back if y'all are using my accommodations as the excuse. And why have I never gone before DRAC AND WHY HAVE I NEVER GOT ANYTHING IN WRITING. Saying my accommodations can no longer be accommodated even thou nothing has changed since they were approved.[57]

[55] R. Exh. 23.
[56] R. Exh. 26 at 9-11.
[57] Id. at 12.

On December 31, Ballard informed Sanchez that she would submit her compensation claim to DOL but noted that Sanchez "would have to provide medical documentation to support her absence." Sanchez disagreed with that approach:

> I was sent home for retaliation on May 21 for filing EEO and Osha now mgt is trying to say I'm home due to my restrictions can't be accommodated but it's not true they told me to get paid I have to file work comp but I don't feel it's work comp I feel Usps should pay me for retaliation and discrimination. They have never given me anything saying I cannot be accommodated either only verbal on a conference call on June 12, 2018 a few emails from [Doberow] and Ann but Ann don't understand either why they aren't letting me work I'm capable and I've been capable since the day she sent me home.[58]

On January 3, 2019, Ballard notified DOL that Sanchez had been asked for current medical information "since the season has change" (sic) but had only provided the May 23 doctor's note. She asked DOL to "assign a nurse to Ms. Sanchez to assist with getting Ms. Sanchez back to her prior injury position."[59]

On January 14, 2019, Dr. Hosein issued the following work restrictions: a mask and frequent breaks. He also noted that Sanchez's symptoms are worse in the heat and humidity.

On January 22, 2019, Sanchez asked Ballard for an update regarding her workers' compensation claim. On January 29, 2019, Ballard replied that the delay was attributable to her lack of cooperation since 2017. On February 6, 2019, Ballard reminded Sanchez about the process to file data properly and sought to speak with Sanchez about her claims.

Between March 5 and April 23, 2019, Ballard was pressed by Beverly Miller, the Respondent's injury compensation specialist, wondering why Sanchez could not be accommodated in the cooler months: "No work available with restriction of wearing a mask? One document states she can't be in extreme heat but I think we are good for her to work in the winter/spring/fall months as an RCA." Ballard replied that clarification was needed regarding Sanchez's restriction requiring that she take frequent breaks – a restriction that cannot be applied to carriers.[60]

On May 21, 2019, Dr. Suddith issued the following medical limitations: "no exposure to heat, humidity, toxic fumes, smoke, or volatile chemicals."[61]

On June 6, 2019, Ballard asked DOL for a "second opinion" to seek review for possible accommodation. On June 27, 2019, DOL asked Dr. Suddith for updated medical data. On July 8, 2019, he answered DOL's inquiry listing the following restrictions: "no exposure to heat, humidity, toxic fumes or volatile chemicals."[62]

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[58] Id. at 14.
[59] R. Exh. 29.
[60] R. Exh. 26 at 19-24.
[61] R. Exh. 17 at 9-13.
[62] R. Exh. 30 at 1-8.

On July 30, 2019, Ballard asked Sanchez for updated medical data.[63] On August 23, 2019, Ballard responded to an Equal Employment Opportunity Commission specialist's inquiry. She explained that Sanchez could not be accommodated because the latest medical information prohibited exposure to heat and humidity, and it was is impossible to accommodate due to the duties of a rural carrier associate. Ballard said that Sanchez was sent out on a second opinion appointment on August 15, 2019 and that the Respondent was waiting to see if the new doctor determined that she could return to work.

On the same day, Dr. Suddith issued a Return to Work recommendation requiring that Sanchez get a 30-minute break per day. Sanchez brought the note to the facility and it was forwarded to the Respondent's labor relations and human resources representatives.

Ballard, however, was not satisfied with that recommendation and emailed the DOL claims examiner on September 10, 2019. She sought clarification regarding the frequency of breaks and limited exposure to extreme heat. Ballard reiterated the need for such clarification in a memorandum, dated September 30, 2019. In it she mentioned the possibility of limiting Sanchez to an 8-hour workday.[64] She was unaware that on September 29, Dr. Morales issued a second opinion clarification permitting Sanchez to work an 8-hour shift with three 10-minute breaks. The turning point in this medical-legal drama was attributable to a major development – better medication enabling Sanchez's restrictions to be reduced – "exposure to extreme temperatures is not contraindicated in the presence of asthma [relieving] therapy."[65]

On November 7, DOL issued a clarification granting Sanchez "within an 8 hour work period a 30 minute break to use at her discretion."[66] Sanchez finally returned to work at the Ludowici facility on November 9, 2019. Her current employment accommodations allow her to work up to eight hours a day, with three 10-minute breaks.

G. Sanchez's Requests to Work as a Clerk

During the period that she was off the schedule, Sanchez attempted on numerous occasions to return to work as a clerk inside the facility. She made that initial request to White on June 26 and asked to be placed in a clerk position. White informed Sanchez that there were no clerk positions available. Sanchez then attempted to file a grievance with White alleging the Respondent violated the Rehabilitation Act of 1973 by failing to utilize "her services as a clerk and other office duties." White refused to accept the grievance and asked Sanchez who helped her fill out the form. After Sanchez replied that she filled it out herself. White then told Sanchez that Brunson should not tell her how to fill out grievances, adding that Sanchez was wasting her time filing grievances because the Respondent would side with White.[67]

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[63] R. Exh. 28.

[64] R. 26 at 28-31, 33.

[65] R. Exh. 32 at 2.

[66] Id. at 54(b).

[67] I credited Sanchez's credible version of this encounter, which was corroborated by Steiner, over White's wholesale denial and failure to address any of the encounters. (Tr. 75-77, 84-85, 160-61, 322; GC Exh. 18.)

Sanchez made similar requests with each of the supervisors who managed the Ludowici facility after she left in August and continued until October 2019 when Smith took over. Even though at least two other carriers worked as clerks during that period, Sanchez was always told that no such work was available.[68]

H. The Respondent's Position Statement

On September 14, during the investigation of the charges in this case, the Respondent provided a position statement summarizing its approach to removing Sanchez from the schedule. It reads in relevant part:

> Ms. Sanchez was indefinitely removed from the work schedule due to her pending removal from the Post Office, at that particular time, for her failure to report for an investigatory interview on May 17, 2018, concerning her unsatisfactory performance and, thereafter, because Management was unable to accommodate the extreme nature of her medical work restrictions, in her capacity as a Rural Letter Carrier. In particular, Ms. Sanchez is unable to work in excessive heat or cold temperatures. Management's proposed removal action against Ms. Sanchez was not ultimately issued to her and she (Sanchez) is currently out of work on OWCP (Office of Worker's Compensation Programs), specifically due to the nature of her medical restrictions and Management's inability to accommodate those restrictions. In that regard, the Department of Labor has sole discretion concerning the administration of her OWCP/FECA claim, including, but not limited to, compensation payments.[69]

LEGAL ANALYSIS

I. THE SECTION 8(A)(1) ALLEGATIONS

The complaint alleges that White, on several occasions in May and June at the Ludowici facility, told employees that it would be futile for them to file grievances. The Respondent denies that charge and avers that it is untimely and, thus, barred by Section 10(b) of the Act.

A. *The Section 10(b) Defense*

Section 10(b) states that "no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b). It is well established that untimely allegations can be considered when the charge is "closely related to" the violations alleged in the original charge. *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988). The Board considers whether: (1) the otherwise untimely allegations are of the same legal theory; (2) the otherwise untimely allegations arise from the same factual situation; and (3) a respondent would raise the same or similar defense to both allegations. Id. At least two of these factors are needed in order to establish the requisite closeness. See *Carney Hospital*,

[68] The Respondent does not dispute that Sanchez consistently requested clerical work or that that other carriers were given such work during that period. (Tr. 76, 84, 92-93, 608-09; GC Exh. 21.)

[69] GC Exh. 33.

350 NLRB 627, 628 (2007) (mere occurrence of the alleged violations during or in response to the same organizing campaign was insufficient to establish a close factual relationship).

The second amended charge, filed July 16, 2019, was filed about 15 months after White uttered the statements about their grievances to Sanchez, Peacock, and Steiner. Although untimely, the Section 8(a)(1) allegations are an integral component to the timely filed Section 8(a)(3) charge that White's removal from the work schedule was due in part to her grievance activity. See *Sonicraft, Inc. v. NLRB*, 905 F.2d 146, 148–149 (allegations concerning layoffs were closely related to allegations of discriminatory recall); *Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939, 944–945 (D.C. Cir. 1999), enfg. in part 324 NLRB 918 n. 1 (1997) (allegations close enough where they arose out of the same factual circumstances and defenses were the same). Cf. *Peerless Pump Co*., 345 NLRB 371, 374 (2005) (late filed Section 8(a)(5) claim not closely related to a distinct Section 8(a)(3) charge).

As such, White's statements of futility revealed union animus, an integral part of the General Counsel's explanation as to why she unlawfully retaliated by removing Sanchez from the schedule. The Respondent, on the other hand, presented a similar defense to both allegations – that White did not make the statements, and in any event, the statements were not proof of animus leading to Sanchez's removal from the schedule. See also *The Earthgrains Company*, 351 NLRB 733, 737 (2007) (although the defense would likely be different between the timely and untimely charge, barring the addition of the untimely claim would endorse an unintended result). Accordingly, the Respondent's untimeliness defense fails.

B. *White's Coercive Statements*

On May 11, White followed Sanchez out to the parking lot when she went to call her union representative. As Sanchez attempted to make the call, White told her to hang up the telephone because the Union was not going to help her. Sanchez defied her at first, insisting she had the right to make a call on her lunch break, but complied and hung up. On June 6, Peacock and Steiner attempted to file grievances with White regarding their route measurements. However, White refused to sign the grievances and added that they were wasting their time and the Respondent would believe her over them.

Section 8(a)(1) of the Act provides that it is an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act. *EF International Language Schools*, 363 NLRB No. 20 (2015). The Board has held that an employer acts unlawful when "suggesting that the grievance procedure is ineffective or implying that it will refuse to cooperate with the contractual grievance process." *Prudential Ins. Co*., 317 NLRB 357, 358 (1995).

White violated Section 8(a)(1) by making unlawful threats of futility regarding the grievance process. Her warnings that management would believe her over them and that filing grievances was a waste of time undermined employee confidence in the effectiveness of the dispute resolution process. See *Intermodal Bridge Transport*, 369 NLRB No. 37 (2020) (distinguishing comments that suggest filing grievances would be ineffectual versus a description of one's experiences with a union). Moreover, the circumstances surrounding White's

statements to Sanchez – her refusal to sign the grievances, following Sanchez to the parking lot and telling her to "get out of her face" – reinforced the coercive nature of her remarks. See *Venture Industries, Inc.*, 330 NLRB 1133, 1134 (2000) (context and nature of the statement used to convey threat of futility).

II. THE SECTION 8(A)(3) ALLEGATIONS

The complaint also alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully removing Sanchez from the schedule on May 21 in retaliation for her grievance activity. The Respondent denies any discriminatory motivation behind its action and attributes Sanchez's removal from the schedule to its inability to accommodate her due to the nature of the carrier position and her refusal to provide medical documentation.

In order to prove the Respondent unlawfully removed Sanchez from the schedule on May 21 in retaliation for her grievance activity, the General Counsel must show that union animus was a substantial and motivating part in the adverse employment action. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The elements required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer. See *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007); *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip. op. at 1 (2018). If the General Counsel establishes those elements, the burden shifts to the employer to affirmatively prove that the same action would have taken place absent the protected activity. *Donaldson Bros Ready Mix, Inc.*, 341 NLRB 958, 961, 965 (2004). (employer had not sent employees home early or prohibited them from clocking in early at any time during the previous nine years and did not establish a business reason for doing so now).

The initial elements of protected union activity and knowledge are not disputed. Sanchez attempted to file grievances with White and she rejected them. Furthermore, although the Respondent insists that Sanchez was not disciplined, there is no doubt that she incurred adverse action when White took her off the schedule on May 21. The Respondent argues, however, that White's statements of futility, standing alone, are insufficient to show hostility; perhaps, it posits, they are merely indicative of indifference. Relying on *Tschiggfrie Properties*, 368 NLRB No. 120 (2019), the Respondent contends that more is needed to make that inferential leap.

In *Tschiggfrie Properties*, the Board held that evidence of animus must support a finding that a causal relationship exists between an employee's protected activity and the employer's adverse action. In that case, an employer's warnings about the employee's union activity and consequences if it continued sufficed to causally connect the employer's animus to the employee's protected activity and his discharge. Id. at 1; Cf. *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 419 (2004) (the circumstantial evidence was insufficient to show that employer's animus against employee's union activity motivated its decision not to call the employee back for another position).

White initially rejected Sanchez's attempt to file a grievance regarding compensation on May 4. On May 7, she acknowledged in an email to Ballard that Sanchez informed her of limitations due to "lung issues" and asked whether she should even be working. Ballard

merely replied that Sanchez did not have an open workers' compensation case. On May 11, Sanchez tried again to file the grievance with Sanchez and was rejected. White then followed Sanchez out to the parking lot as she attempted to call the Union and told her to hang up because they would not help her anyway. On May 15, White took advantage of Sanchez's authorized absence to schedule a sham disciplinary process that enabled her to remove Sanchez indefinitely from the schedule on May 21. Although White listed concerns about Sanchez's breaks and time needed to complete her route, she was clearly perturbed by Sanchez's invocation of the grievance process. See *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip. op. at 9 (2018) (employer's numerous 8(a)(1) violations and the employee's union activity proved that the employee's termination was due to that activity); See also *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996) (discriminatory motivation may reasonably be inferred from unlawful remarks together with knowledge of the employee's union activity).

White's systemic and utter disregard for and suppression of the grievance process revealed extreme union animus; in her world prior to May 21, the Union did not seem to exist. Her statements and actions, when coupled with the dubious timing of her disciplinary maneuver on May 15 and removal of Sanchez from the schedule on May 21, constitute compelling circumstantial evidence that White's expressed union animus was causally connected to her desire to get rid of Sanchez. See *Corn Brothers, Inc.*, 262 NLRB 320, 324 (1982) (inferring union animus as the cause of employee's termination from the discharge occurring less than a week after union activity); *Allstate Power Vac, Inc.*, 357 NLRB 344, 346 (2011) (significant weight placed on the timing of the employer's actions in relation to the adverse action); *EF International Language Schools, Inc.*, 363 NLRB No. 20 (adverse action was pretextual where reasons advanced by employer either did not exist or were not relied on).

While there is clear evidence that union animus towards Sanchez's protected conduct, there is insufficient evidence as to whether the Respondent further discriminated against her by denying her work as a clerk. It is not disputed that two carriers were afforded work as clerks on several occasions during her time off the schedule. However, there is no specific evidence as to the circumstances – when that occurred, whether they were assigned pursuant to a priority list, or whether they were diverted during their shifts to cover the clerk's position.

Based on the foregoing, the General Counsel established a prima facie case that Sanchez's removal from the schedule on May 21 was unlawfully motivated by White's union animus. However, the burden then shifted to the Respondent to demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of Sanchez's protected conduct. See *Consolidated Bus Transit*, above at 1066 (employer's presentation of a legitimate reason for the adverse action is insufficient – proof by a preponderance of the evidence that it would have taken the same action even in the absence of the protected activity is required) (quoting *W.F. Bolin Co.*, above at 1119).

The Respondent claims that Sanchez had to be removed from the schedule on May 21 after experiencing heat exhaustion because management could not accommodate her medical condition, even though Warden had approved restrictions. It also contends that Dr. Hosein's May 23 doctor's note, which omitted any reference to temperatures, muddied the waters even

more. The General Counsel challenges those actions as pretextual, retaliatory and irrelevant to White's sham disciplinary process and removal of Sanchez from the schedule.

Contrary to the Respondent's repeated claims, the status of Sanchez's workers' compensation claim case was irrelevant since Warden granted her an accommodation for one year. Similarly, the May 23 report or anything else that transpired after May 21 also has no relevance to this aspect of the analysis. The only issue here is whether Sanchez's removal from the schedule on *May 21* would have transpired in the absence of her protected conduct. The March 26 doctor's note that Warden relied upon in approving Sanchez's accommodations until April 12, 2019 required that she "refrain from exposure to excessive heat or cold as defined by 10 degrees higher or lower [than] the average temperatures for that climate." As the proof demonstrated, the weather in Ludowici was not static. There were hot and cold days, and days where the weather was in between. The only reasonable interpretation of the March 26 note is that Sanchez should not work on hot days when the weather exceeded the average historical temperature for that day by 10 or more degrees, or cold days when the weather was more than 10 degrees below the historical average on those days. There is no proof, however, that White, Crawford, Ballard or anyone else determined that the weather beginning May 21 and any other days going forward would fall within the definition of extreme temperature which would preclude Sanchez from working.

White certainly had the right to speak to Sanchez about the time it was taking her to complete her mail route. The arrival of outgoing mail to the Ludowici facility after 6:45 p.m. was causing her to drive nearly four hours roundtrip to the Jacksonville distribution facility. However, White conceded that Sanchez told her that she was slowed down by her "lung" issues. Had she given proper and fair notice to Sanchez of the disciplinary interview, it is reasonable to infer that Sanchez would have defended herself with Warden's April 12 approval of her accommodations. Surely, removal from the schedule might have been possible. However, the possibility of such an outcome does not equate with the likelihood of that result, much less certainty. As illustrated by the 18 months of emails, meetings and reports involving the Respondent's human resources and labor relations departments, as well as DOL's workers' compensation examiners and doctors, it is extremely unlikely that White would have been able to simply remove Sanchez from the schedule indefinitely due to the year-long accommodations afforded Sanchez on April 12. See *East End Bus Lines, Inc.*, above at 11 (conduct that employer could have discharged employee in the interest of student safety did not satisfy employer's burden to show that the conduct would have resulted in discharge).

The Respondent argues that the weather was cooler when Warden allowed Sanchez to return to work on April 12 than it was on May 11. That reality, however, is not the issue. Warden approved Sanchez's accommodation through April 12, 2019, and the doctor's note that his approval was premised upon allowed Sanchez to work if the temperature on any given day did not exceed the amounts defined as extreme – 10 or more degrees above the average temperature. The issues of Sanchez's performance and medical condition were not raised by Warden after Sanchez returned to work on April 12. White arrived and imposed a stricter work environment but did not raise any concerns until after Sanchez attempted to file a grievance on May 4. See *M.D. Miller Trucking & Topsoil, Inc.*, 361 NLRB 1225, 1233 (2014) (employer

never raised concerns surrounding employee's medical condition until the employee began engaging in union activity).

Finally, when Sanchez was removed from the schedule, White refused to explain why. The initial reasoning for Sanchez's removal was her failure to report to the investigatory interview and unsatisfactory performance. Then it was because of her medical condition or the false claim that Sanchez simply did not show up for work. The Respondent's shifting reasoning for removing her from the work schedule demonstrates the adverse action was in precipitated by union activity. See *Tschiggfrie Properties, Ltd.*, above at 7 (first heard of the alleged reasons for discharge at the hearing); *Lucky Cab Co.*, 360 NLRB 271, 274 (2014) (shifting explanations for adverse action indicates pretextual reasoning).

Based on the relevant and credible evidence, the Respondent failed to prove by a preponderance of the evidence that Sanchez would have been removed from the schedule on May 21 in the absence of her efforts to file grievances with White within the previous two weeks. Accordingly, the Respondent violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS

(1) The Respondent, United States Postal Service, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

(2) The National Association of Letter Carriers has been a labor organization within the meaning of Section 2(5) of the Act

(3) By making statements of futility to employees on May 11 and June 6, 2018 regarding grievance filing activities, the Respondent violated Section 8(a)(1) of the Act.

(4) By removing Connie Sanchez from the schedule on May 21, 2018 in retaliation for her protected activities and union activities, the Respondent violated Section 8(a)(3) and (1) of the Act.

(5) The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and 2(7) of the Act.

REMEDY

Having found the Respondent has engaged in certain unfair labor practices, I order it to post the attached Order, desist and take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) of the Act by taking Connie Renee Sanchez off the work schedule on May 21, 2018, the Respondent is ordered to offer her full reinstatement to her schedule, without prejudice to her seniority or any other rights or privileges previously enjoyed, and to make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her. Backpay shall be computed in accordance with *F.W. Woolworth Co*., 90 NLRB 289 50 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed

in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, the Respondent is ordered to compensate Sanchez for any adverse tax consequences resulting from a lump-sum backpay award and to file, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report with the Regional Director for Region 10 allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB 5 No. 146 (2016). In accordance with the Board's decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in rel. part 859 F.3d 23 (D.C. 2017), the Respondent is ordered to compensate Sanchez for her search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for work and interim employment expenses shall be calculated separate from taxable net backpay, with interest at the rate prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River*, above. The Respondent is also required to remove from its files any references to the unlawful disciplinary action on May 17, 2018 and to notify Sanchez in writing that this has been done and that those actions will not be used against her in any way.

On the findings of facts and conclusions of law, and upon the entire record in this case, I issue the following recommended

ORDER[70]

The Respondent, United States Postal Service, its officers, agents, successors, and assigns shall:

(1) Cease and desist from:

(a) Discharging and/or removing employees from the schedule in retaliation for their protected activities and/or union activities.

(b) Informing employees that filing grievances is a waste of time.

(c) Informing employees that they will not win grievances when they attempt to file them.

(d) In any other manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(2) Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make whole Connie Sanchez for any loss of earnings and other benefits plus interest from the May 21, 2018 to the day she returned to the work schedule.

[70] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

(b) Within 14 days after service by the Region, post at its Ludowici, Georgia facility copies of the attached notice marked "Appendix."[71] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 11, 2018.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 29, 2020

Michael A. Rosas
Administrative Law Judge

[71] If the facility involved in these proceedings is open and staffed by a substantial compliment of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

In recognition of these rights, we hereby notify employees that:

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the National Labor Relations Act.

WE WILL NOT tell you that filing a grievance is a waste of time.

WE WILL NOT tell you that you will not be able to win a grievance.

WE WILL NOT fire you or indefinitely remove you from the schedule because of your union membership or support.

WE WILL pay Connie Renee Sanchez for the wages and other benefits she lost because we removed her from the schedule.

United States Postal Service
(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website at www.nlrb.gov Harris Tower, 233 Peachtree Street, N.E., Suite 1000, Atlanta, GA 30303-1531 (404) 331-2896, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/10-CA-223776 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273- 940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (410) 962-2880.